Supreme Court, U.S.
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In The

Supreme Court of the United States

DOMINICK DIONISIO,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the district court's dismissal of a RICO conspiracy charge "with prejudice," in accordance with a plea agreement whereby Petitioner pled guilty to a RICO substantive charge, posed a double jeopardy bar, by way of res judicata and collateral estoppel principles, to subsequent prosecution for RICO conspiracy alleging the same offense conduct?

2. Whether, as the court of appeals held while noting that none of this Court's decisions directly addressed the question, in order for a pretrial dismissal to trigger the protections of the Double Jeopardy Clause there must be an adjudication of elements of the offense charged, in a way that reflected a genuine risk of conviction?

3. Where in his guilty plea allocution for the RICO substantive charge Petitioner admitted to most or all of the elements of the RICO conspiracy charge – admissions that could be introduced against him in a subsequent proceeding – whether the court of appeals correctly held that the dismissal with prejudice did not entail a resolution of any factual elements that went to the merits of the RICO conspiracy charge nor did the process put Petitioner at any risk of conviction?

4. Whether the court of appeals' holding undermines the utility of the everyday practice of obtaining dismissal of the remaining counts of an indictment in connection with a negotiated plea of guilty to one or more counts?

PARTIES TO THE PROCEEDING BELOW

The parties to the proceeding in the court whose judgment is sought to be reviewed were as in the caption.

TABLE OF CONTENTS

Page

Questions Presented i

Parties to The Proceeding Below ii

Table of Authorities iv

Opinions Below 1

Jurisdiction 1

Constitutional Provision Involved 2

Statement of the Case 2

Reasons for Granting the Petition 7

Conclusion 14

Appendix

Opinion of the United States Court of Appeals for the Second Circuit ..... App. 1

Opinion of the United States District Court for the Eastern District of New York ..... App. 26

Order of the United States Court of Appeals for the Second Circuit Denying Rehearing ..... App. 51

TABLE OF AUTHORITIES

Page

CASES

Ashe v. Swenson, 397 U.S. 436 (1970) 8, 9, 10, 11

Burks v. United States, 437 U.S. 1 (1978) 13

Elfenbein v. Gulf & Western Industries, Inc., 590 F.2d 445 (2d Cir. 1978).....11

Serfass v. United States, 420 U.S. 377 (1975).....8, 9, 10, 11

United States v. Covington, 395 U.S. 57 (1969).....8

United States v. Cunan, 156 F.3d 110 (1st Cir. 1998).....11

United States v. Martin Linen Supply Co., 430 U.S. 564 (1977).....9

United States v. Scott, 437 U.S. 82 (1978).....12, 13

United States v. Taylor, 487 U.S. 326 (1988).....11

STATUTES AND RULES

18 U.S.C. § 1961 *et seq.* 5

18 U.S.C. § 1962(c) 2

18 U.S.C. § 1962(d).....2

18 U.S.C. § 3161 11

28 U.S.C. § 1254 1

Fed. R. Crim. P. 11(c)(1).....11

PETITION FOR A WRIT OF CERTIORARI

Petitioner prays for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The United States Court of Appeals for the Second Circuit, in an opinion reported at 503 F.3d 78 and reproduced in the appendix at App. 1, affirmed an order of the United States District Court for the Eastern District of New York, denying Petitioner's motion to dismiss a count of his indictment on double jeopardy grounds. The district court's opinion is reported at 415 F.Supp.2d 191 and is reproduced in the appendix at App. 26.

JURISDICTION

The judgment of the court of appeals was entered on September 17, 2007, and Petitioner's timely petition for rehearing was denied on March 24, 2008. (App. 51) This petition for a writ of certiorari is being timely filed within ninety days of denial of the petition for rehearing in compliance with Rule 13.3 of this Court's rules. The Court's jurisdiction is invoked under 28 U.S.C. § 1254.

CONSTITUTIONAL PROVISION INVOLVED

Unites States Constitution, Amendment V, provides in pertinent part:

> [N]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb.

STATEMENT OF THE CASE

1. Petitioner, indicted in 2004 in the Eastern District of New York for RICO conspiracy, 18 U.S.C. § 1962(d), moved to dismiss the indictment on the grounds that it alleged, among other things, two racketeering acts that consisted of the same offense conduct as a racketeering act in a RICO conspiracy count of a 2001 indictment. That RICO conspiracy count had been dismissed "with prejudice" pursuant to a plea agreement after Petitioner pled guilty to a RICO substantive count, 18 U.S.C. § 1962(c), in the 2001 indictment.

2. Petitioner's 2001 indictment, among other counts, alleged a substantive RICO violation and a RICO conspiracy between 1993 and 2001 in connection with the Colombo organized crime family. (COA App. 7ff.) Both charges alleged several racketeering acts, including a conspiracy to distribute marijuana between January 1999 and May 1999. (COA App. 14) Petitioner pled guilty to the RICO substantive count on January 15, 2002, pursuant to a written plea agreement that provided for dismissal "with

prejudice" of the RICO conspiracy count and other counts:

> At the time of sentence, [the United States Attorney's Office] will move to dismiss the remaining counts of the referenced superseding indictment and the underlying indictments *with prejudice*. (COA App. 27; emphasis added.)

At the plea proceeding, Petitioner allocuted that between November 1993 and April 2001 in the Eastern District of New York and elsewhere he was part of the enterprise charged in the indictment, which engaged in activities that affected interstate commerce, and knowingly and intentionally participated in the conduct of the affairs of that enterprise through a pattern of racketeering activity. (COA Rehearing App. B-28) He further allocuted, in some detail, to the commission of all six racketeering acts alleged in both the RICO substantive count and RICO conspiracy count: conspiring with others to use extortionate means to collect extensions of credit and a related money laundering conspiracy, a marijuana distribution conspiracy, a MDMA ("Ecstasy") distribution conspiracy, a securities fraud conspiracy and a related money laundering conspiracy. (COA Rehearing App. B-28-30)

After eliciting from the Government that there was nothing more it wished the court to ask "to satisfy the elements of any of the predicate acts or racketeering charge" and concluding that there was a

factual basis for the plea of guilty, the district court accepted the plea. (COA Rehearing App. B-36-37)

Petitioner was sentenced on June 4, 2002, to 78 months imprisonment, and the outstanding charges were dismissed on the Government's motion. (COA App. 30)

3. In 2004, Petitioner was again indicted in the Eastern District of New York for RICO conspiracy from November 1991 to May 1999 in connection with the Colombo family. The indictment alleged four racketeering acts, two of which were conspiracies to rob marijuana from narcotics traffickers between August 1998 and May 1999. (COA App. 41-42)

Petitioner moved to dismiss the indictment, contending that the conspiracies to rob marijuana alleged as racketeering acts in the 2004 indictment was the same offense conduct as the conspiracy to distribute marijuana alleged as a racketeering act in the 2001 indictment, and that the Double Jeopardy Clause was therefore offended because the 2001 RICO conspiracy count had been dismissed with prejudice. Petitioner also contended that the 2004 indictment violated the earlier plea agreement, which provided in pertinent part:

> [N]o further criminal charges will be brought against the defendant for the specific crimes charged against the defendant in the above-captioned superseding indictment, it being understood that this agreement does not bar the use of such conduct as a predicate act or

> as the basis for a sentencing enhancement in a subsequent prosecution, including, but not limited to, a prosecution pursuant to 18 U.S.C. §§ 1961 *et seq.* (COA App. 27)

4. In a decision filed on February 15, 2006, the district court held that there was no double jeopardy bar to the 2004 prosecution because jeopardy had not attached to the 2001 charge dismissed with prejudice. (App. 26ff.) According to the court, jeopardy did not attach because "the defendant was never 'put to trial before the trier of facts,' and there was no 'risk of a determination of guilt.'" (App. 42; citation omitted.) In light of that holding, the court did not reach the issue of whether the two indictments charged the same offense.[1] (App. 43) The court also held that re-prosecution did not breach the plea agreement because, even though it provided that no further criminal charges would be brought against the defendant for the specific crimes charged in the indictment, it also permitted "use of such conduct as a predicate act" in a subsequent RICO prosecution. (App. 45)

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[1] The Government conceded in the district court, at least with regard to one of the racketeering acts in the 2004 indictment alleging a conspiracy to rob marijuana (Racketeering Act Three), that it related to the same marijuana which the 2001 indictment alleged the defendant conspired to distribute and, further, that in 2001 the Government "knew about the conduct in [Racketeering Act] three [of the 2004 indictment]" and would have introduced it as evidence of the marijuana distribution conspiracy had the 2001 indictment been tried. (COA App. 46-52)

5. Petitioner brought an interlocutory appeal solely on double jeopardy grounds. The court of appeals, while rejecting the district court's categorical approach as a misreading of this Court's precedents and noting that none of this Court's decisions directly addressed the question, as to which there was "uncertainty," held that the dismissal with prejudice of a charge prior to trial pursuant to a plea agreement does not trigger the protections of the Double Jeopardy Clause unless there is an adjudication of the elements of that charge. (App. 3, 9) Without such an adjudication, a defendant is not faced with the "risk of conviction" placing him in genuine jeopardy. (App. 3, 12, 17, 22) The key issue, according to the court, is "whether the disposition of an individual's indictment entailed findings of facts on the merits such that the defendant was placed in genuine jeopardy by the making of such findings." (App. 12)

As to Petitioner, the court of appeals held that "there is nothing in the record to suggest that the dismissal entailed a resolution of any factual elements that went to the merits of the charges against Dionisio" or "involved a process that put Dionisio at any risk of conviction." (App. 25) Consequently, "no jeopardy attached as a result of Dionisio's plea agreement and the subsequent dismissal of some counts with prejudice." (App. 25)

6. In petitioning for rehearing, Petitioner called the court of appeals' attention to the detailed factual admissions in his allocution and the district court's close questioning of him, and argued that the

conjunction of Petitioner's factual allocution to a RICO substantive offense, the district court's acceptance of his plea to a single count of the indictment as having a factual basis, and the court's subsequent dismissal of the RICO conspiracy count with prejudice – notwithstanding Petitioner's admitting elements of that offense – did entail a resolution of the factual elements that went to the merits of the RICO conspiracy charge, and thus he was placed in jeopardy. Rehearing was denied. (App. 52)

7. The district court has stayed Petitioner's trial pending the outcome of this petition.

REASONS FOR GRANTING THE PETITION

I. The Court of Appeals' Holding Undermines The Utility of The Everyday Practice of Obtaining Dismissal of The Remaining Counts of An Indictment in Connection with A Negotiated Plea of Guilty to One Or More Counts And Exposes Defendants to The Risk of Prosecution And Conviction on The Dismissed Counts Based on Admissions in The Guilty Plea Allocution.

1. The court of appeals' holding effectively eliminates double jeopardy protection against remaining counts of an indictment dismissed by a district court with prejudice in connection with a negotiated plea of guilty to one count, even when the remaining counts contain some, most or all of the

same elements as the count to which the defendant has admitted guilt and allocuted. The Double Jeopardy Clause, consequently, would present no bar to the Government's immediately re-indicting the defendant on the dismissed counts and using his allocution to obtain conviction.[2]

Such a result does not comport with the collateral estoppel component of the Double Jeopardy Clause. *See Ashe v. Swenson*, 397 U.S. 436, 445 (1970) (collateral estoppel rule "is embodied in the Fifth Amendment guarantee against double jeopardy").

The foundation for the court of appeals' conception that without an adjudication of the factual elements of the charge a defendant is not faced with "the risk of conviction" placing him in genuine jeopardy is the statement in *Serfass v. United States*, 420 U.S. 377 (1975), that "[w]ithout risk of a determination of guilt, jeopardy does not attach." (App. 11, *citing* 420 U.S. at 391-92).[3] That statement in *Serfass*,

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[2] It is no answer that the defendant may be protected from further prosecution by a plea agreement, because such agreements almost universally bind only the particular United States Attorney's office in the district where the negotiated plea is entered.

[3] The complete sentence in the court of appeals' opinion is as follows: "Because the pretrial proceedings [in *Serfass*] did not actually concern 'facts surrounding the commission of the alleged offense,' *id.* at 389 (quoting *United States v. Covington*, 395 U.S. 57, 60 (1969)), the High Court rejected defendant's claim and said: 'Without risk of a determination of guilt, jeopardy does not attach. . . .' *Id.* at 391-92." (App. 11) However, the

(Continued on following page)

however, was made in the context of rejecting Serfass' argument that he had been functionally "acquitted" in a pretrial ruling by a district judge. The judge, in that pretrial posture as opposed to the posture of a bench trial, was "without power" to acquit Serfass or to convict him, so held the Court in referring to the absence of a "risk of conviction" associated with a proceeding before a trier of fact. *Id.* at 389, 391.

Confining double jeopardy protection only to cases where there is a "risk of conviction" as to a specific charge undervalues the collateral estoppel component of the Double Jeopardy Clause. After all, in *Ashe v. Swenson*, 397 U.S. 436, where the defendant was tried and acquitted for the robbery of one of six players in a poker game, Knight, and was then tried for the robbery of one of the other players, Roberts, the defendant, during the trial relating to Knight, had not faced the "risk of conviction" for robbing Roberts. A defendant who pleads guilty to a RICO substantive offense – and admits to all its

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linkage between the above causal and main clauses is less than clear, appearing, as they do, two pages apart in *Serfass*. Thus, the court of appeals' formula that without an adjudication of the factual elements of the charge a defendant is not faced with the risk of conviction appears to be only an explication of *Serfass* rather than found in *Serfass* itself.

The court of appeals also cited *United States v. Martin Linen Supply Co.*, 430 U.S. 564, 571 (1977), as requiring "resolution, correct or not, of some or all of the factual elements of the offense charged" in order to trigger double jeopardy protection. (App. 12)

elements – with the understanding that the virtually identical RICO conspiracy charge will be dismissed with prejudice as a consequence of that guilty plea is much closer to the *Ashe* situation than to that in *Serfass*.

The court of appeals here subordinated the collateral estoppel component of the Double Jeopardy Clause to the "risk of conviction" formula. (*See* App. 16 ("And the existence of res judicata or collateral estoppel does not by itself mean there was jeopardy, that is, it does not answer the question whether a decision on the merits which entailed a risk of conviction had been made").) But that test would completely eliminate collateral estoppel from double jeopardy protections.

In seeking to apply its standard for jeopardy attachment, the court of appeals posed a hypothesis that purportedly *could* implicate double jeopardy interests, but it is one that in actuality would never occur in federal court:

> [A] plea agreement in which the court was directly involved in a defendant's decision to plead guilty to two counts, in exchange for an agreement to drop with prejudice a third count, all on the basis of findings of certain facts which support that agreement, might perhaps constitute a pretrial fact-finding that implicated double jeopardy in its proper sense of risk of exposure. (App. 13)

District court judges, of course, "must not participate in [plea agreement] discussions." Fed. R. Crim. P. 11(c)(1). And district court judges in criminal cases, where summary judgment is unavailable, are "without power" to engage in pretrial fact-finding regarding the merits of a charge. *Serfass v. United States*, 420 U.S. at 389. Since "risk of conviction" and dismissal are all but mutually exclusive, the court of appeals' difficulty in hypothesizing a scenario in which a dismissed count would trigger double jeopardy protection is due to the court's own conception that without an adjudication of the factual elements of the specific charge a defendant is not faced with "the risk of conviction" placing him in genuine jeopardy. (App. 3) To require an adjudication of a charge voluntarily dismissed with prejudice is impracticable, if not nonsensical.

"[A] voluntary dismissal with prejudice is ordinarily deemed a final judgment that satisfies the *res judicata* criterion." *United States v. Cunan*, 156 F.3d 110, 114 (1st Cir. 1998); *see also Elfenbein v. Gulf & Western Industries, Inc.*, 590 F.2d 445, 449 (2d Cir. 1978) ("with prejudice" is generally deemed a determination of the *res judicata* effect of a dismissal, thus operating as an adjudication on the merits); *cf. United States v. Taylor*, 487 U.S. 326 (1988) (noting that dismissal of an indictment "with prejudice" under 18 U.S.C. § 3161 for a violation of the Speedy Trial Act bars reprosecution). There is nothing radical about applying that common principle, consistent with *Ashe v. Swenson*, to the everyday practice of

dismissing counts of an indictment, pursuant to a plea agreement, in connection with a plea of guilty to one or more counts of the indictment. Without such a clear rule, that everyday practice is imperiled.

2. Unless the dismissal of the RICO conspiracy charge with prejudice bars further prosecution of Petitioner on that charge, the process by which he pled guilty to the RICO substantive offense surely put him at risk of conviction on the RICO conspiracy charge. In his allocution – as he was obliged to do to satisfy the requirement that the district court find a factual basis for the plea – Petitioner admitted that between November 1993 and April 2001 in the Eastern District of New York and elsewhere he was part of the enterprise charged in the indictment, which engaged in activities that affected interstate commerce, and knowingly and intentionally participated in the conduct of the affairs of that enterprise through a pattern of racketeering activity, including the commission of all six racketeering acts alleged in both the RICO substantive count and RICO conspiracy count: conspiring with others to use extortionate means to collect extensions of credit and a related money laundering conspiracy, a marijuana distribution conspiracy, a MDMA distribution conspiracy, a securities fraud conspiracy and a related money laundering conspiracy. (COA Rehearing App. B-28-30) Those admissions were tantamount to admitting guilt of the RICO conspiracy charge, but for its dismissal.

Thus, this is not at all like *United States v. Scott*, 437 U.S. 82 (1978), to which the court of appeals

referred as comporting with its standard for jeopardy attachment. (App. 12) There, the dismissal "was based upon a claim of preindictment delay and not on the court's conclusion that the Government had not produced sufficient evidence to establish guilt of the defendant." *Id.* a 95. Here, where the defendant effectively admitted his guilt of the RICO conspiracy charge, albeit upon an agreement it would be dismissed, there was no attempt, as in *Scott*, "to seek termination of the trial on grounds unrelated to guilt or innocence." *Id.* at 96. Nor, for similar reasons, is it like *Burks v. United States*, 437 U.S. 1 (1978), also referred to by the court of appeals (App. 12), where this Court distinguished between trial error, which would not bar retrial, and evidentiary insufficiency, which would. Petitioner claims no procedural error, but rather that the dismissal with prejudice operated to render an adjudication of the facts, admitted facts, moot.

CONCLUSION

The petition for a writ of certiorari should be granted.

Dated: June 13, 2008

Respectfully submitted,

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UNITED STATES OF AMERICA, Appellee, v. DOMINICK DIONISIO, a.k.a. BLACK DOM, Defendant-Appellant.

Docket No. 06-0908-cr

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

November 15, 2006, Argued
September 17, 2007, Decided

COUNSEL: THOMAS J. SEIGEL, Assistant United States Attorney, for Roslynn R. Mauskopf, United States Attorney for the Eastern District of New York (David C. James, Assistant United States Attorney, on the brief), for Appellee.

DIARMUID WHITE, White & White, Port Washington, N.Y. (Brendan White & James Froccaro, on the brief), for Defendant-Appellant.

JUDGES: Before: CALABRESI, WESLEY, Circuit Judges, OBERDORFER, District Judge.*

OPINION

CALABRESI, Circuit Judge:

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* The Honorable Louis F. Oberdorfer, of the United States District Court for the District of Columbia, sitting by designation.

Defendant Dominick Dionisio appeals the district court's denial of his motion to dismiss a racketeering conspiracy charge that he claims is prohibited by the Double Jeopardy Clause. Dionisio contends that the protections of the Double Jeopardy Clause were triggered when, pursuant to a plea agreement, the court previously dismissed with prejudice another racketeering conspiracy charge against him that was allegedly based on the same offense conduct. Guaranteeing that no person shall "be subject for the same offense to be twice put in jeopardy of life or limb," U.S. Const. amend. V, the Double Jeopardy Clause protects criminal defendants against "a second prosecution for the same offense after acquittal," "a second prosecution for the same offense after conviction," and "multiple punishments for the same offense." *North Carolina v. Pearce,* 395 U.S. 711, 717, 89 S. Ct. 2072, 23 L. Ed. 2d 656 (1969) *overruled on other grounds by Alabama v. Smith,* 490 U.S. 794, 109 S. Ct. 2201, 104 L. Ed. 2d 865 (1989).

The instant appeal implicates the first of these protections. In doing so, it raises a question that is open in this circuit. Under what circumstances, if ever, does a court's dismissal with prejudice of a charge (pursuant to a plea agreement with the government and prior to a trial by a fact-finder), constitute "jeopardy" for purposes of the Fifth Amendment? We affirm the lower court's determination that, based on the record in the case at bar, the pretrial dismissal of Dionisio's 2001 conspiracy indictment with prejudice did not amount to jeopardy. We do not today

decide that jeopardy may never attach as a result of a pretrial dismissal with prejudice. Rather, we hold only (1) that in order for a pretrial dismissal to trigger the protections of the Double Jeopardy Clause, there must be an adjudication of elements of the offense charged, in a way that reflected a genuine risk of conviction, and (2) that no such adjudication occurred in the instant case.

I. BACKGROUND

The relevant facts are not in dispute. In 2001, in the Eastern District of New York, Dionisio was charged under the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1962(c), with counts of substantive racketeering, racketeering conspiracy, and other offenses [hereinafter "2001 indictment"]. These involved the Colombo organized crime family of La Cosa Nostra. The charged conduct allegedly took place from 1993 to 2001. The counts of substantive racketeering and racketeering conspiracy asserted several of the same predicate acts, including a conspiracy to distribute marijuana between January 1999 and May 1999.[1] Pursuant to a plea agreement, Dionisio pled guilty to one count of substantive racketeering, and the court sentenced him to 78 months' imprisonment to run concurrently with a

[1] The substantive racketeering charge listed as the predicate acts: loansharking, securities fraud, money laundering, and other drug trafficking.

prior sentence. Also pursuant to the plea agreement, the government moved to dismiss with prejudice the other counts against Dionisio. Among these was the racketeering conspiracy charge. Dionisio's plea agreement provided that:

> (a) no further criminal charges will be brought against the defendant for the specific crimes charged against the defendant in the above-captioned superseding indictment, it being understood that this agreement does not bar the use of such conduct as a predicate act or as the basis for a sentencing enhancement in a subsequent prosecution including, but not limited to, a prosecution pursuant to 18 U.S.C. §§ 1961 et seq.;
>
> (b) At the time of sentence, [the government] will move to dismiss the remaining counts of the referenced superseding indictment and the underlying indictments *with prejudice*.

(emphasis added). The agreement further stated that "[s]hould it be judged by the Office that the defendant has violated any provision of this agreement, the defendant will not be released from his plea of guilty but this Office will be released from its obligations under this agreement." *Id.*

In 2004, Dionisio was once again indicted in the Eastern District of New York on the charge of racketeering conspiracy, this time in violation of 18 U.S.C. § 1962(d) [hereinafter "2004 indictment"]. His charged conduct, also in connection with the Colombo crime

family, assertedly took place from November 1991 to May 1999. This conspiracy, as identified by the district court, was based on four claimed predicate acts: "(1) a 1991 double attempted murder, (2) a 1991 robbery of a Yeshiva, (3) a conspiracy to rob marijuana from Hispanic narcotics traffickers in or about and between August 1998 and May 1999, and (4) a conspiracy to rob marijuana 'from a white male residing in the vicinity of Battery Park City in Lower Manhattan' in or about and between August 1998 and May 1999." *United States v. Dionisio,* 415 F. Supp. 2d 191, 194 (E.D.N.Y. 2006) (quoting Def.'s Ex. E. ¶¶ 11-19).

On June 3, 2005, defendant moved to dismiss the indictment both as a violation of the Double Jeopardy Clause and as a breach by the government of the 2001 plea agreement. Dionisio contended that the 2004 marijuana conspiracy indictment to rob marijuana traffickers was based on the same conduct as that which formed the predicate of Dionisio's 2001 marijuana conspiracy indictment. Because the earlier conspiracy indictment had been dismissed "with prejudice," defendant argued that he could not be exposed to jeopardy again on a conspiracy charge grounded in the same offense conduct. Dionisio also argued that the 2004 indictment violated the government's plea agreement pledge that "no further criminal charges will be brought against the defendant for the specific crimes charged" in the 2001 indictment.

On February 15, 2006, the district court (Judge Irizarry) denied Dionisio's motion to dismiss. The court rebuffed the double jeopardy challenge; it held that "jeopardy did not attach when the racketeering conspiracy charge was dismissed with prejudice from the 2001 indictment pursuant to defendant's plea agreement." 415 F. Supp. 2d at 199; *see generally id.* at 195-200. Rejecting defendant's contention that the government had breached the plea agreement, the court noted that the agreement dismissed the 2001 counts only "for the specific crimes charged" and, even if the crimes charged in the 2001 and 2004 indictments were the same, the plea agreement expressly stated that it "does not bar the use of . . . conduct [like that alleged in the 2001 indictment] as a predicate act" in future racketeering prosecutions. *Id.* at 194. The court did not consider whether the two indictments were based on the same offense conduct.

On appeal, at this time, Dionisio may only challenge the double jeopardy ground of the court's denial of his motion to dismiss. And it is that which he seeks to have reversed.[2] He contends that jeopardy attached when the court dismissed, with prejudice, his 2001

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[2] A defendant usually may only appeal from a court's final decision, which, in a criminal case, is marked by the imposition of a sentence. *Flanagan v. United States*, 465 U.S. 259, 263, 104 S. Ct. 1051, 79 L. Ed. 2d 288 (1984). An interlocutory appeal from a district court pretrial order denying a motion to dismiss an indictment on double jeopardy grounds is, however, permitted. *Abney v. United States*, 431 U.S. 651, 658-62, 97 S. Ct. 2034, 52 L. Ed. 2d 651 (1977). *See also infra* note 3.

indictment for racketeering conspiracy, and further that the dismissal "with prejudice" bears the preclusive force of res judicata because, in effect, it operates as an adjudication on the merits and therefore bars subsequent prosecutions. In response, the government argues that jeopardy did not attach in 2001. It contends that the court gave only ministerial approval to the parties' 2001 plea agreement, and that the resulting dismissal of the racketeering conspiracy charge can neither be the grounds for collateral estoppel nor for the attachment of jeopardy.

II. DISCUSSION

We review Dionisio's double jeopardy challenge de novo. *United States v. Estrada,* 320 F.3d 173, 180 (2d Cir. 2003). It goes without saying that "an accused must suffer jeopardy before he can suffer double jeopardy." *Serfass v. United States,* 420 U.S. 377, 393, 95 S. Ct. 1055, 43 L. Ed. 2d 265 (1975); *United States v. Von Barta,* 635 F.2d 999, 1004 (2d Cir. 1980), *cert. denied,* 450 U.S. 998, 101 S. Ct. 1703, 68 L. Ed. 2d 199 (1981) (quoting *Serfass,* 420 U.S. at 393); *see also United States v. Jorn,* 400 U.S. 470, 480, 91 S. Ct. 547, 27 L. Ed. 2d 543 (1971); *see generally Ex parte Lange,* 85 U.S. (18 Wall.) 163, 168-69, 21 L. Ed. 872 (1873) (establishing that the Double Jeopardy Clause bars a second prosecution only if jeopardy attached in the original proceeding). At the heart of this appeal is whether the 2001 dismissal with prejudice of the

charge against Dionisio placed him in sufficient jeopardy to trigger the protections of the Clause.[3]

As the district court correctly noted, "no Second Circuit or Supreme Court authority directly address[es] whether jeopardy attaches when a charge is dismissed with prejudice pursuant to a plea agreement," 415 F. Supp. 2d at 196. The court nevertheless held that pretrial dismissal with prejudice cannot trigger the attachment of jeopardy. While we believe that the court's categorical ruling was based on a misreading of both Supreme Court and our precedents, as well as an over-reading of the decisions of other circuits, we conclude that on the facts of this case its rejection of appellant's double jeopardy claim was appropriate.

Because a defendant's constitutional interest in finality attaches well before a verdict is reached, it is firmly established that the "attachment of jeopardy" occurs not only with a verdict but more generally at the "point in criminal proceedings at which the constitutional purposes and policies [of the clause] are

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[3] Defendant additionally suggests that the 2004 indictment violated the government's plea agreement pledge that "no further criminal charges will be brought against the defendant for the specific crimes charged" in the 2001 indictment. This challenge is not sufficiently intertwined with Dionisio's double jeopardy question to allow us to consider it on interlocutory appeal. *See supra* note 2. Accordingly, we express no view on the matter and expect that any questions concerning defendant's claim will remain before the district court and be subject to appeal once the case is concluded.

implicated." *Serfass,* 420 U.S. at 388. As a result, the Supreme Court has long recognized that jeopardy attaches in a *jury* trial after the jury has been empaneled and sworn, *see Kepner v. United States,* 195 U.S. 100, 128, 24 S. Ct. 797, 49 L. Ed. 114 (1904), and in a *bench* trial when the judge begins to hear evidence. *Wade v. Hunter,* 336 U.S. 684, 688, 69 S. Ct. 834, 93 L. Ed. 974 (1949); *McCarthy v. Zerbst,* 85 F.2d 640, 642 (10th Cir.), *cert. denied,* 299 U.S. 610, 57 S. Ct. 313, 81 L. Ed. 450 (1936). We have recognized, however, that while jeopardy certainly attaches in a trial on the merits after a jury is sworn or a judge hears evidence, "it is less clear . . . what *pretrial* proceedings are such as to place a defendant in jeopardy." *Lockett v. Montemango,* 784 F.2d 78, 82 (2d Cir. 1986).

In view of this uncertainty, we begin by examining the standard, established by the Supreme Court and applied by numerous courts of appeals, for evaluating when the protections of the Double Jeopardy Clause may be triggered by a pretrial dismissal.[4]

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[4] We do not, and need not, resolve on the facts before us the question of whether the 2001 and 2004 racketeering conspiracy counts charged the same offense conduct. In *Blockburger v. United States,* the Supreme Court held that "where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not." 284 U.S. 299, 304, 52 S. Ct. 180, 76 L. Ed. 306 (1932). In discussing (and rejecting on other grounds) Dionisio's claim that the government breached

(Continued on following page)

A. Identifying the Attachment of Jeopardy.

(1) The *Serfass* Standard

Serfass v. United States, 420 U.S. 377, 95 S. Ct. 1055, 43 L. Ed. 2d 265 (1975), provides the primary guidepost for evaluating pretrial attachments of jeopardy. In *Serfass,* the Supreme Court reviewed the dismissal, before trial, of an indictment that had been based on defendant's failure to report for military service. Despite Serfass's contention that the pretrial dismissal relied on "evidentiary facts outside of the indictment, which facts would constitute a defense on the merits at trial," *id.* at 390 (citations omitted), the

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the 2001 plea agreement, the district court properly identified the *Blockburger* framework as the way to determine "whether two racketeering conspiracy charges are the 'same offense' for double jeopardy purposes." 415 F. Supp. 2d at 202 (citing *Russotti v. United States,* 717 F.2d 27, 33 (2d Cir. 1983) (holding that the same offense conduct is only evident when "*both* the enterprise and the pattern of activity alleged" in the earlier indictment are the same as those alleged in the later indictment)). But the court did not then apply the framework to the case at bar because it concluded that jeopardy would not attach to the 2001 indictment anyway.

In many cases involving double jeopardy claims, it is desirable for a district court to decide the *Blockburger* question first, and thereby avoid what may be complex constitutional issues. In this case, however, since there is nothing in the record to suggest that the pretrial dismissal of Dionisio's 2001 indictment "represented a resolution of any of the factual elements of the offense charged," *United States v. Dahlstrum,* 655 F.2d 971, 974 (9th Cir. 1981), we do not address the *Blockburger* challenge by defendant.

Court held that "formal or technical jeopardy" had not attached, because the court that had dismissed the indictment was "without power to make any determination regarding petitioner's guilt or innocence." *Id.* at 389 (citations omitted). But the Supreme Court went further, and stated that even if a dismissal were based on evidentiary facts that gave rise to a constructive acquittal, the word "acquittal" bore "no talismanic quality for purposes of the Double Jeopardy Clause." *Id.* at 392. Rather, "an 'acquittal' cannot be divorced from the procedural context in which the action so characterized was taken." *Id.* Because the pretrial proceedings did not actually concern "facts surrounding the commission of the alleged offense," *id.* at 389 (quoting *United States v. Covington,* 395 U.S. 57, 60, 89 S. Ct. 1559, 23 L. Ed. 2d 94 (1969)), the High Court rejected defendant's claim and said: "Without risk of a determination of guilt, jeopardy does not attach. . . .". *Id.* at 391-92.

Subsequently, in applying *Serfass,* the Supreme Court has underscored the need to look beyond the form of the court's pretrial ruling to its substance in order to determine whether the dismissal actually represented a "*resolution, correct or not, of some or all of the factual elements of the offense charged.*" *United States v. Martin Linen Supply Co.,* 430 U.S. 564, 571, 97 S. Ct. 1349, 51 L. Ed. 2d 642 (1977) (emphasis added). In *Martin Linen,* the Court addressed a judgment of acquittal issued by a trial judge after a deadlocked jury had been discharged. Concluding

that the Double Jeopardy Clause barred the government's appeal, the Court emphasized the need to evaluate "whether the ruling of the judge, whatever its label, actually represents a resolution, correct or not, of some or all of the factual elements of the offense charged. There can be no question that the judgments of acquittal entered here . . . were 'acquittals' in substance as well as form." *Id.* at 571-72.

The *Serfass-Martin Linen* framework requires that we look beyond formalistic labels of acquittal or conviction and scrutinize the substantive resolution underlying that disposition. But these decisions also confirm that it is not necessary to have an actual acquittal or, for that matter, a conviction, in order to trigger double jeopardy. What is crucial, instead, is whether the defendant faced the risk of a determination of guilt, and this may well include exposure to risk of conviction in a pretrial plea proceeding. Thus, the key issue, even in a pretrial context, is whether the disposition of an individual's indictment entailed findings of facts on the merits such that the defendant was placed in genuine jeopardy by the making of such findings. This standard for jeopardy attachment comports with the Court's later decisions in *Burks v. United States,* 437 U.S. 1, 98 S. Ct. 2141, 57 L. Ed. 2d 1 (1978), and in *United States v. Scott,* 437 U.S. 82, 98 S. Ct. 2187, 57 L. Ed. 2d 65 (1978), which establish that, in identifying whether jeopardy attached, it is necessary to distinguish: (a) between "determinations that relate to a defendant's culpability and those that are merely procedural and do not bear on

the defendant's blameworthiness," as well as (b) between "questions of fact and questions of law." *Kruelski v. Conn.Super. Ct. for the Jud. Dist. of Danbury,* 316 F.3d 103, 109 (2d Cir. 2003); *see also Smalis v. Pennsylvania,* 476 U.S. 140, 106 S. Ct. 1745, 90 L. Ed. 2d 116 (1986) (holding that a trial judge's grant of a demurrer, based on insufficiency of the evidence to establish factual guilt, constituted a nonappealable acquittal under the Double Jeopardy Clause).

The practical import of these distinctions is evident in any number of pretrial dispositions. For instance, the determination that a defendant was not tried within the relevant speedy trial time is a finding of fact. But it is not a finding of fact that involves jeopardy. By contrast, a plea agreement in which the court was directly involved in a defendant's decision to plead guilty to two counts, in exchange for an agreement to drop with prejudice a third count,[5] all on the basis of findings of certain facts which support that agreement, might perhaps constitute a pretrial fact-finding that implicated jeopardy in its proper sense of risk of exposure. And the same would likely be true if an individual were to plead guilty to an offense before trial, and the government subsequently were to seek to indict that person for a lesser-included offense. It follows that the adjudication of

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[5] Federal Rule of Criminal Procedure 11(c)(1) currently bars federal judges from participating in plea discussions. Such participation may, however, be possible under some state procedures.

some facts that go to the *merits* of a charge against a defendant is essential to the standard established in *Serfass* and *Martin Linen,* for only if the facts go to the merits of the case can it be said that the defendant was placed in actual jeopardy.

(2) The Significance of Preclusion

None of these requirements are diminished by principles of preclusion. In *United States v. Oppenheimer,* 242 U.S. 85, 37 S. Ct. 68, 61 L. Ed. 161 (1916), the Court found the defendant's indictment to be prohibited because an earlier indictment for the same offense had been held to be barred by a statute of limitations. A later ruling in another case rendered invalid the statute-of-limitations reasoning on the basis of which Oppenheimer's first indictment had been dismissed. The government then sought to recharge Oppenheimer with the identical crimes that had originally been deemed precluded. Rejecting this new indictment, Justice Holmes wrote for the Court:

> It cannot be that the safeguards of the person, so often and so rightly mentioned with solemn reverence, are less than those that protect from a liability in debt. It cannot be that a judgment of acquittal on the ground of the statute of limitations is less a protection against a second trial than a judgment upon the ground of innocence, or that such a judgment is any more effective when entered after a verdict than if entered by the government's consent before a jury is

> empaneled; or that it is conclusive if entered upon the general issue, but if upon a special plea of the statute, permits the defendant to be prosecuted again. We do not suppose that it would be doubted that a judgment upon a demurrer to the merits would be a bar to a second indictment in the same words.
>
> Of course, the quashing of a bad indictment is no bar to a prosecution upon a good one, but a judgment for the defendant upon [a] ground that . . . goes to his liability as [a] matter of substantive law, and one judgment that he is free as matter of substantive law is as good as another. *A plea of the statute of limitations is a plea to the merits,* and however the issue was raised in the former case, after judgment upon it, it could not be reopened in a later prosecution.

Id. at 87-88 (internal citations omitted) (emphasis added).[6]

The *Oppenheimer* Court expressly rejected both the government's contention "that the doctrine of res judicata does not exist for criminal cases except in the modified form of the 5th Amendment" and the government's conclusion "that a decision upon a plea in bar cannot prevent a second trial when the defendant

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[6] Crucial to this decision was Holmes' interpretation of the statute of limitations before the Court as going to the merits of culpability. Not all statutes of limitations in all states do so. *See*, for example, the discussion of different statutes of limitations in *Kruelski*, 316 F.3d at 111 n.10. *See also infra* note 7.

never has been in jeopardy *in the sense of being before a jury* upon the facts of the offense charged." *Id.* at 87 (emphasis added). The Court then said: "[T]he 5th Amendment was not intended to do away with what in the civil law is a fundamental principle of justice in order, when a man once has been acquitted *on the merits,* to enable the government to prosecute him a second time." *Id.* at 88 (internal citations omitted) (emphasis added).

Since *Oppenheimer,* there has been much debate on whether that case was grounded in the Double Jeopardy Clause or in broader Due Process arguments. *See, e.g., DiGiangiemo v. Regan,* 528 F.2d 1262, 1264 (2d Cir. 1975); *Paradise v. CCI Warden,* 136 F.3d 331, 336-37 (2d Cir. 1998). But in the end, that discussion is neither here nor there for the issue before us. The Supreme Court did state in *Ashe v. Swenson,* 397 U.S. 436, 442, 90 S. Ct. 1189, 25 L. Ed. 2d 469 (1970), that res judicata and collateral estoppel are "ingredient[s] of the Fifth Amendment guarantee against double jeopardy." And so they are. But this does not alter the fact that, as the later *Serfass* and *Martin Linen* cases held, there must be jeopardy in order for there to be double jeopardy. And the existence of res judicata or collateral estoppel does not by itself mean there was jeopardy, that is, it does not answer the question whether a decision on the merits which entailed a risk of conviction had been made. On the facts in *Oppenheimer,* Justice Holmes found that such a decision had there occurred. That, however, means only that a court is

required to see whether the operative facts in the case it faces lead to the same or another conclusion. In the case before us, that requires us to consider whether the dismissal with prejudice arising out of an agreement between the parties – whatever it may mean civilly – reflected a resolution of facts crucial to the merits of the *criminal* case that had been brought, and did so through a process that involved a risk of conviction for the defendant.

B. Use of Other Court Decisions by the Court Below

We conclude that the Supreme Court's decisions in *Serfass, Martin Linen, Oppenheimer* and *Ashe* direct a court's attention to a pretrial dismissal's *substance* rather than its form. They focus on the core question of whether there has been a fact-based resolution of elements of the offense charged as a result of a process in which the defendant risked conviction. It is that core question that we must address. The district court, instead, held that where a dismissal with prejudice occurs *pretrial,* no such inquiry is necessary, for no jeopardy can attach. We believe that in reaching this conclusion the district court read decisions of our court and of other circuit courts concerning pretrial dismissals and jeopardy too broadly. And we are not prepared to affirm such a categorical holding.

Our court has applied *Serfass* and its progeny to reject numerous double jeopardy claims that were

based on pretrial dismissals. In each case, however, the dismissal had clearly not constituted a resolution of the factual elements of the offense charged in a manner that involved a risk of conviction. Either the opinion did not assert that the dismissal was with prejudice, or the factual elements were manifestly not resolved, or conviction was not in any way at stake. Thus, in *Lockett v. Montemango* we found that jeopardy did not attach to a charge to which, with court approval, the defendant pled that he was "not responsible by reason of mental disease or defect." 784 F.2d at 83-84. In looking beyond defendant's formal "acquittal," we relied upon the New York Court of Appeals' holding that, under the state statute authorizing this plea-based acquittal, the court had power only either to permit the statute-based plea or to reject it and allow the criminal proceedings to continue: "In no event could the court make a binding factual finding of the defendant's guilt." *Id.* at 84 (quoting *Lockett v. Juviler,* 65 N.Y.2d 182, 480 N.E.2d 378, 382, 490 N.Y.S.2d 764 (N.Y. 1985)) (emphasis removed). Because only the validity of the defendant's claim of mental disease or defect was at stake in the court's evaluation, he "never risked conviction at his plea proceeding and therefore never was in jeopardy." *Id.*

And in *United States v. Fontanez,* 869 F.2d 180, 183 (2d Cir. 1989), we similarly applied *Serfass* in reviewing the double jeopardy challenge of a defendant whose previously dismissed narcotics conspiracy indictment in Canada was alleged to be "virtually

identical" to a narcotics conspiracy charged by the United States. Even if the two charges were identical, we held, "when a count has been dismissed, jeopardy has not attached unless the defendant was first 'put to trial.'" *Id.* at 183 (quoting *Serfass,* 420 U.S. at 388). "Since [the narcotics conspiracy] count . . . of the Canadian indictment was dismissed without a trial having been commenced, Fontanez was not placed in jeopardy on the Canadian charge of conspiracy." *Id.* Critically, however, the record in *Fontanez* did not indicate that the earlier dismissal was "with prejudice." And, despite our holding's use of the term "dismissed," *id.,* our statement of facts observed only that the earlier charge in question was simply "withdrawn." *Id.* at 182.[7]

The decisions of other circuits, even those concerning the specific issue of a dismissal with prejudice, similarly stand only for the – correct – principle that jeopardy does not attach in the absence of exposure by the defendant to a determination going to "factual guilt or innocence." The D.C. Circuit Court of

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[7] We have, from time to time, in dicta, cited the Supreme Court's post-*Serfass* jurisprudence in support of the categorical proposition that jeopardy does not attach as a result of an indictment's pretrial dismissal. For instance, *Martin Linen* was cited by our court, in dicta, in support of the statement that "[t]here can be no double jeopardy issue, where, as here, the initial prosecution was decided on a pretrial motion." *Paradise v. CCI Warden,* 136 F.3d at 336. But as *Martin Linen* makes clear, *see supra* II.A(1), that jurisprudence does not support those dicta. Rather, in each case, the court looked past the form of the prior court's pretrial ruling to its substance.

Appeals' decision in *United States v. Lindsey,* 310 U.S. App. D.C. 300, 47 F.3d 440 (D.C. Cir. 1995), *vacated on other grounds sub nom., Robinson v. United States,* 516 U.S. 1023, 116 S. Ct. 665, 133 L. Ed. 2d 516 (1995), provides a prime example.

In *Lindsey,* the court rejected defendant's argument that a District of Columbia local court's pretrial dismissal of a charge "with prejudice" triggered the double jeopardy bar against his prosecution in the federal district court for the same offense. *Id.* at 444. Significantly, the *Lindsey* court did not hold that the pretrial dismissal of a charge with prejudice could not trigger the attachment of jeopardy. It did not even establish a presumption against such attachment. Instead, the court found that, in *Lindsey,* the *particular* dismissal did not involve questions of factual guilt or innocence. This was because in that case, the reason for the grant of a dismissal with prejudice was – as the court of appeals expressly stated – "*merely to yield jurisdiction to the federal district court.*" *Id.* (emphasis added). And, as the *Lindsey* court further said, the dismissing court "certainly had no power to dismiss the separate indictment then pending in the United States District Court." *Id.* "Understood in its proper context, then, [the] dismissal 'with prejudice' merely operated to bar reprosecution *in the District of Columbia [local] courts.*"[8] *Id.* (emphasis added). In

[8] There is no indication, of course, that the bar to prosecution in local courts was based on double jeopardy.

other words, the proceedings before the dismissing court in no way put the defendant at risk of conviction and so could not entail jeopardy.

Likewise, in *United States v. Stricklin*, the Fifth Circuit Court of Appeals concluded that, although the government would be barred by the Sixth Amendment from indicting a defendant for a charge that previously had been dismissed with prejudice for lack of a speedy trial, the defendant's claim that the dismissal triggered the attachment of jeopardy failed because the lack of a speedy prosecution had "nothing to do with guilt or innocence or the truth of the allegations in the indictment." 591 F.2d 1112, 1120 (5th Cir. 1979), *cert. denied,* 444 U.S. 963, 100 S. Ct. 449, 62 L. Ed. 2d 375 (1979) (quoting *United States v. Marion,* 404 U.S. 307, 312, 92 S. Ct. 455, 30 L. Ed. 2d 468 (1971)).

In reaching this conclusion, the *Stricklin* Court relied on the Supreme Court's *Marion* decision, *id.*, which established the principle that a dismissal due to the lack of a speedy prosecution was not a judgment on the merits:

> The motion to dismiss rested on grounds that had nothing to do with guilt or innocence or the truth of the allegations in the indictment but was, rather, a plea in the nature of confession and avoidance, that is, where the defendant does not deny that he has committed the acts alleged and that the acts were a crime but instead pleads that he cannot be prosecuted because of some

> extraneous factor, such as the running of the statute of limitations or the denial of a speedy trial.

Marion, 404 U.S. at 312.[9] Thus, *Stricklin*, like *Lindsey*, confirms the principle that a pretrial dismissal, even with prejudice, does not trigger the attachment of jeopardy unless it represents a merits-based resolution of allegations in the indictment in a way that involved risk of conviction.[10]

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[9] *Marion*'s comment about statutes of limitations might be thought to be in tension with *Oppenheimer*, in which a statute-of-limitations violation was deemed a merits-based pretrial dismissal. *Marion* and *Oppenheimer* are quite reconcilable, however. *Oppenheimer* turned on the Court's construction of the particular federal statute of limitations before the Court. *See supra* note 5. For the same reason, our court found reasonable, despite *Oppenheimer*, the Connecticut Supreme Court's conclusion that a violation of its state statute of limitations did not provide a merits-based pretrial dismissal triggering jeopardy protections. *Kruelski*, 316 F.3d at 111 n.10. This was because Connecticut interpreted *its* statute of limitations very differently from the interpretation apparently given by the Supreme Court to the limitations statute in *Oppenheimer*. As read by the Connecticut courts, a dismissal pursuant to Connecticut's limitation statute said nothing about the defendant's criminal culpability. *Id.* at 110-11.

[10] The district court also cited rulings from a number of other courts that declined to apply a double jeopardy bar following an indictment's pretrial dismissal pursuant to a plea agreement. *See, e.g., United States v. Nyhuis*, 8 F.3d 731, 735 n.2 (11th Cir. 1993) ("We may disregard the § 846 conspiracy charge in the Michigan indictment which was dismissed pursuant to Nyhuis's plea agreement because jeopardy did not attach to that dismissed charge."); *United States v. Soto-Alvarez*, 958 F.2d 473, 482 n.7 (1st Cir. 1992) ("[J]eopardy ordinarily does not attach to

(Continued on following page)

Finally, the district court relied specifically on the finding in *United States v. Dahlstrum,* 655 F.2d 971, 974 (9th Cir. 1981), *cert. denied,* 455 U.S. 928, 102 S. Ct. 1293, 71 L. Ed. 2d 472 (1982), that an indictment's "dismissal is not equivalent to acquittal even if dismissal is 'with prejudice.'" 415 F. Supp. 2d at 199 (citing *United States v. Vaughan,* 715 F.2d 1373, 1376 (9th Cir. 1983)). But *Dahlstrum,* instead, confirms the importance of looking past a pretrial ruling's label to the underlying record. For in *Dahlstrum* the lower court's dismissal with prejudice was manifestly not a determination of culpability. The *Dahlstrum* court found that while "the district judge had serious doubts as to whether the government had established its case beyond a reasonable doubt," the judge had expressly stated that the dismissal was "not on the merits" but rather was due to "governmental misconduct." 655 F.2d at 974.

As a result, *Dahlstrum,* no less than *Stricklin, Lindsey*, and the other cases cited by the court below, must be not be read as a holding that forecloses the possibility of the attachment of jeopardy to a pretrial dismissal with prejudice. Rather, it must be viewed as a decision that denies the attachment of jeopardy

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counts which are dismissed and on which no finding of guilty is made"). But *Nyhuis*'s sparse analysis of the dismissal in a footnote does not indicate whether the charge was dismissed with prejudice, and *Soto-Alvarez*'s assertions that jeopardy "ordinarily" does not attach based on a pretrial dismissal, also does not indicate whether a dismissal with prejudice was being considered.

when, "[a]fter reviewing the entire record, [the reviewing court] cannot conclude, with any degree of certainty, that the district judge's disposition actually represented a resolution of any of the factual elements of the offense charged." *Id.* Not surprisingly, then, in *United States v. Cejas,* 817 F.2d 595, 598, 600 (9th Cir. 1987), decided after *Dahlstrum,* the Ninth Circuit expressly held that where a charge's pretrial dismissal *was* on the merits – not due to faulty procedure or technical defects in the indictment – a subsequent prosecution was barred.[11]

C. The Merits

We therefore conclude that the district court overread our court's and other circuit court decisions in reaching its holding that a pretrial dismissal with prejudice necessarily entails no jeopardy. And we doubt that such a bright line test would be consistent with the Supreme Court decisions in *Oppenheimer, Ashe, Serfass,* and *Martin Linen.* Nevertheless, we need not take an ultimate position on that issue. For, in the case before us, even if we apply the more nuanced test that we think the Supreme Court cases

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[11] Similarly, the Tenth Circuit Court of Appeals has found that jeopardy attached when a conspiracy charge was dismissed with prejudice, *see United States v. Mintz,* 16 F.3d 1101 (10th Cir. 1994). But the lower court in the case at bar persuasively argued that the Tenth Circuit, in reaching this conclusion, mistakenly relied on what it thought was binding precedent, and so its holding was without any reasoned foundation. *See generally* 415 F. Supp. 2d at 196-97.

have established, we must hold that no jeopardy attached as a result of Dionisio's plea agreement and the subsequent dismissal of some counts with prejudice.

The record discloses only an agreement *between the parties* that following Dionisio's plea of guilty to one count of substantive racketeering, the government would move to dismiss the remaining counts with prejudice. The government, in fact, made such a motion, and the court duly dismissed the other counts. But we do not know the reason or basis for that dismissal. And there is nothing in the record to suggest that the dismissal entailed a resolution of any factual elements that went to the merits of the charges against Dionisio. There is, moreover, certainly no indication that any such resolution (assuming *arguendo* that one had occurred) involved a process that put Dionisio at any risk of conviction. Under the circumstances, the requirements for the attachment of jeopardy that, we believe, the Supreme Court has established have not been met. Hence, the district court – although it applied a less nuanced, and less satisfactory, test – nonetheless reached the correct result.

III. CONCLUSION

For these reasons, we AFFIRM the district court's holding that Dionisio's 2004 indictment was not barred by the Double Jeopardy Clause.

United States of America, -against- Dominick Dionisio, also known as "Black Dom," Defendant.

04-CR-1068 (DLI)

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK

February 15, 2006, Decided

MEMORANDUM AND ORDER

DORA L. IRIZARRY, U.S. District Judge:

Defendant Dominick Dionisio, an associate of the Colombo organized crime family of La Cosa Nostra since around 1990, presently is charged with racketeering conspiracy in violation of the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1962(d) (hereinafter the "2004 indictment"). Defendant moves to dismiss the 2004 indictment on double jeopardy grounds and a breach of plea agreement theory. The court held oral argument on defendant's motion on September 1, 2005 and asked the parties for further briefing on the issues. For the reasons that follow, defendant's motion is denied.

Defendant's motion to dismiss is based on the disposition of a previous indictment, in 2001, in the Eastern District of New York (01-CR-56) for substantive racketeering and racketeering conspiracy charges covering the time period from 1993 to 2001 and involving the Colombo family (hereinafter the "2001

indictment"). Pursuant to a written plea agreement, defendant pled guilty on January 16, 2002 to one count of substantive racketeering (RICO, 18 U.S.C. § 1962(c)), which included the following as predicate, or "racketeering," acts: loansharking conspiracy, two acts of money laundering conspiracy, conspiracy to distribute marijuana, conspiracy to distribute MDMA, and securities fraud.[1] The racketeering conspiracy count alleged in the 2001 indictment included these same racketeering acts. Other than the substantive racketeering count, all other counts in the 2001 indictment, including the racketeering conspiracy count, were dismissed "with prejudice" (Def.'s Ex. B ¶5(b)).

Defendant contends that the 2004 indictment seeks to punish him for the same conduct he was punished for in the 2001 indictment. Specifically, defendant claims the 2004 indictment repeats conduct contained in Racketeering Act Three of the 2001 indictment, "Conspiracy to Distribute Marijuana," which states:

> In or about and between January 1999 and May 1999, both dates being approximate and inclusive, within the Eastern District of New York and elsewhere, the defendant DOMINICK DIONISIO, together with Enrico Monteperto and others, knowingly and

[1] Though the indictment included ten racketeering acts, defendant was only named in, and pled guilty to, these six racketeering acts.

> intentionally conspired to distribute a substance containing marijuana, a Schedule I controlled substance, in violation of Title 21, United States Code, Section 846.

(Def.'s Ex. A ¶21.) The Presentence Investigation Report (PSR) for the 2001 indictment, dated May 3, 2002, described Racketeering Act Three as follows:

> In 1999, [Joseph] Petillo attempted to recruit [Anthony] Molinaro to pick up a 500 pound (227 kilograms) shipment of marijuana in Baltimore, Maryland, for his (Petillo's) friend. When Molinaro declined the offer, Petillo recruited Monteperto instead. On the day of the arranged pick-up, Dionisio and Monteperto robbed the shipment of marijuana from the suppliers in Baltimore and did not deliver it to Petillo's friend. The Government advised that it is unknown whether the defendants were armed during this robbery. Additionally, it is unknown whether Dionisio and Monteperto distributed the approximately 227 kilograms of marijuana which they stole.

(Def.'s Ex. C ¶40.) An affidavit supplied at the court's request following oral argument, from Gary J. Pontecorvo, an FBI special agent who was the case agent for the 2001 and 2004 prosecutions of defendant, describes this conduct somewhat differently:

> According to [William] Cutolo, Jr., in the Spring of 1999, Dionisio advised him that he (Dionisio) and "Ricky" (Colombo associate Enrico Monteperto) stole 1,000 pounds of

> marijuana from the intended recipients by posing as police officers. Dionisio advised that they drove a car for a long period of time on the East Coast and jumped out of the car and shouted to the recipients of the marijuana load to stick them up. This robbery, according to Cutolo, Jr., caused conflict within the crew of Cutolo, Sr. because crew member and Colombo associate Joseph Petillo was associated with individuals who were to receive the marijuana shipment that Dionisio had stolen. Dionisio further advised Cutolo, Jr. that he had sold the load of marijuana.

(Pontecorvo Aff. ¶4.)

The plea agreement defendant signed in 2002 contained the following language:

> no further criminal charges will be brought against the defendant for the specific crimes charged against the defendant in the above-captioned superseding indictment, it being understood that this agreement does not bar the use of such conduct as a predicate act or as the basis for a sentencing enhancement in a subsequent prosecution including, but not limited to, a prosecution pursuant to 18 U.S.C. §§ 1961 *et seq*.

(Def.'s Ex. B ¶5(a).) The Honorable Reena Raggi, then U.S. District Judge, sentenced defendant on June 4, 2002 to 78 months of imprisonment. This sentence was to run concurrently with a sentence imposed by U.S. District Judge Nina Gershon on September 7,

2000, after defendant pled guilty on April 27, 2000 to another count of substantive racketeering.[2]

The racketeering conspiracy charge in the 2004 indictment, covering November 1991 to May 1999, alleges four racketeering acts: (1) a 1991 double attempted murder, (2) a 1991 robbery of a Yeshiva, (3) a conspiracy to rob marijuana from Hispanic narcotics traffickers in or about and between August 1998 and May 1999, and (4) a conspiracy to rob marijuana "from a white male residing in the vicinity of Battery Park City in Lower Manhattan" in or about and between August 1998 and May 1999. (Def.'s Ex. E ¶¶11-19.) The court requested from the government the additional affidavit signed by Special Agent Pontecorvo to obtain more detail regarding Racketeering Acts Three and Four, both labeled "Robbery Conspiracy," in the 2004 indictment. The following additional facts were provided regarding Racketeering Act Three:

> [Paul] Rizzuto [Colombo family associate] advised the CW [cooperating witness; a Colombo associate] that he and others were following some Mexicans and needed to borrow the CW's car. They agreed to meet at a location in Staten Island. Thereafter, the CW met Rizzuto, Monteperto and Dionisio at the Staten Island location. At that time,

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[2] In this case, which covered the period between January 1991 and March 1998, the enterprise was not the Colombo family but a group of individuals involved in securities fraud.

> Rizzuto explained that they were going to steal marijuana from the Mexicans. . . . The CW later learned that Petillo put in a complaint to Cutolo, Sr. regarding the robbery of this marijuana load. The CW has advised that the load was 1100 to 1200 pounds.

(Pontecorvo Aff. ¶5.) Racketeering Act Four is further described as follows:

> Prior to the CW's provision, in late 2004, of information regarding this robbery, [Pontecorvo] did not have any knowledge from any other source or evidence that it had occurred. According to the CW, in summer 1998 or Spring 1999, the CW was involved in an illegal sports betting operation with the Colombo family. Through the business, the CW met [a] white male, who was a gambler with the operation. . . . The CW learned that he and the white male both knew an individual known as "Lou T." The white male further advised that he had done marijuana deals with Lou T. The CW later learned from Lou T. that this was true. When the CW told Dionisio about the substance of the conversation with the white male, Dionisio planned a robbery of the white male. Dionisio directed the CW to tell Lou T. to order 200 pounds of marijuana from the white male. The CW has advised that Dionisio wanted to set up the white male by making him believe it was an ordinary marijuana transaction. On the day the marijuana was to be picked up, Dionisio, Rizzuto and the CW traveled in the CW's car from Staten Island to the white male's

> apartment building in Lower Manhattan, near the Battery Tunnel exit. When the white male was spotted with two duffel bags, Dionisio and Rizzuto approached the white male and took the bags. The bags, which contained marijuana, were placed in the trunk of the CW's car and the white male was forced into the back seat of the CW's car as Rizzuto held him at gunpoint. The CW later held the gun and kept the white male in the CW's car while Dionisio and Rizzuto went into the white male's building. All four men thereafter drove to Staten Island where they were met by Monteperto. The CW took the bags of marijuana to an apartment in Staten Island. Dionisio, Rizzuto, Monteperto and the white male departed the meeting location in Monteperto's truck.

(Pontecorvo Aff. ¶6.)

Double Jeopardy

The Double Jeopardy Clause, providing that no person shall "be subject for the same offence to be twice put in jeopardy of life or limb," U.S. CONST. amend V, prohibits "successive punishments and . . . prosecutions for the same criminal offense." *United States v. Dixon,* 509 U.S. 688, 696, 113 S. Ct. 2849, 125 L. Ed. 2d 556 (1993). In determining whether the Double Jeopardy Clause prohibits a particular prosecution, it is useful for the court to "to define a point in criminal proceedings at which the constitutional purposes and policies are implicated by resort to the

concept of 'attachment of jeopardy.'" *Serfass v. United States,* 420 U.S. 377, 388, 95 S. Ct. 1055, 43 L. Ed. 2d 265 (1975).

> In the case of a jury trial, jeopardy attaches when a jury is empaneled and sworn. In a nonjury trial, jeopardy attaches when the court begins to hear evidence. The Court has consistently adhered to the view that jeopardy does not attach, and the constitutional prohibition can have no application, until a defendant is "put to trial before the trier of facts, whether the trier be a jury or a judge."

Id. (internal citations omitted) (quoting *United States v. Jorn,* 400 U.S. 470, 479, 91 S. Ct. 547, 27 L. Ed. 2d 543 (1971)). "Without risk of a determination of guilt, jeopardy does not attach. . . ." *Serfass,* 420 U.S. at 391-92.

The Second Circuit has held that substantive racketeering (18 U.S.C. § 1962(c)) and racketeering conspiracy (18 U.S.C. § 1962(d)) are not the same criminal offense for double jeopardy purposes. *United States v. Sessa,* 125 F.3d 68 (2d Cir. 1997). Therefore, the defendant only challenges the repetition of racketeering conspiracy charges in the 2001 and 2004 indictments. While the government argues that jeopardy never attached to the racketeering conspiracy charge because defendant has never been tried or convicted of racketeering conspiracy, the defendant insists that jeopardy attached when the racketeering conspiracy charge was dismissed "with prejudice"

pursuant to his plea agreement. With regard to the threshold question of whether jeopardy attached to the racketeering conspiracy charge, there appears to be no Second Circuit or Supreme Court authority directly addressing whether jeopardy attaches when a charge is dismissed with prejudice pursuant to a plea agreement.

Defendant urges the court to follow *United States v. Mintz,* 16 F.3d 1101 (10th Cir. 1994). In *Mintz,* the defendant pled guilty, in the U.S. District Court for the Southern District of Florida, to conspiracy to import marijuana. Other charges, including conspiracy to possess marijuana with intent to distribute, pursuant to 21 U.S.C. § 846 ("§ 846 conspiracy"), were dismissed with prejudice. Shortly thereafter, defendant was indicted in the U.S. District Court for the District of Kansas for § 846 conspiracy. The Tenth Circuit found the Florida conspiracy charge and the Kansas conspiracy charge to be "one conspiracy," i.e., the "same criminal offense." In reaching this conclusion, the Tenth Circuit impliedly decided, as a threshold matter, that jeopardy attached when the conspiracy charge in the Florida district court was dismissed with prejudice. *See id.* at 1106.

The government argues that *Mintz* was incorrectly decided. The government notes that, instead of discussing *Serfass,* the *Mintz* court relied exclusively on *United States v. Holland,* 956 F.2d 990 (10th Cir. 1992). *Mintz,* 16 F.3d at 1103. The only reference to attachment of jeopardy in *Mintz* is a parenthetical citation to *Holland,* stating, "Jeopardy attached to

conspiracy count which had been dismissed with prejudice." *Id.* In holding that jeopardy attached to the dismissal with prejudice of one of the counts in the indictment, *Holland,* in turn, relied exclusively on *United States v. Derr,* 726 F.2d 617 (10th Cir. 1984), which the government argues is the root of the problem in *Mintz.* The government is correct that this citation chain is faulty, because the decision in *Derr* was not based on double jeopardy principles. In *Derr,* the district court granted the government's motion to dismiss an initial indictment under Fed. R. Crim. P. 48(a) to "best meet the ends of justice." 726 F.2d at 618. Without inquiring further into the government's reasons, the district court granted the government's motion to dismiss without prejudice. Nearly two years later, in a separate prosecution, the government indicted the defendant for the same conduct. The defendant moved to dismiss this second, subsequent indictment, not on double jeopardy grounds but "because the government did not submit any reasons for dismissal" of the first indictment. *Id.* The Tenth Circuit, without any mention of double jeopardy, held that the district court had abused its discretion when it granted the government's Rule 48(a) motion to dismiss without prejudice because "it did not require that the government state reasons for its desire to dismiss the original indictment." *Id.* at 619.

The government additionally submits that *Mintz* appears to be in conflict with other Tenth Circuit authority. The government argues that the *Mintz* court ignored prior precedent established in *United*

States v. King, 581 F.2d 800 (10th Cir. 1978), where the Tenth Circuit, citing *Serfass,* held that jeopardy did not attach to the pretrial dismissal of a prosecutor's information. The government further points out that Tenth Circuit decisions have not followed *Mintz.* For example, in *United States v. Marchese,* 46 F.3d 1020 (10th Cir. 1995), the district court dismissed a thirty-four count indictment upon a pretrial motion made by the defendant. When the government appealed, the defendant argued that the appeal, seeking retrial, was improper because jeopardy had attached when the district judge considered evidence outside of the indictment. Quoting *Serfass,* the Tenth Circuit noted that the defendant had not faced "risk of a determination of guilt." *Id.* at 1022. The Tenth Circuit held that jeopardy had not attached, stating that arguments on the motion "did not constitute the presentation of evidence for the purpose of determining guilt or innocence, which is 'the essence of the attachment of jeopardy.'" *Id.* at 1023 (quoting *United States v. Olson,* 751 F.2d 1126, 1128 (9th Cir. 1985)). In another case, *United States v. La Cock,* 366 F.3d 883 (10th Cir. 2004), the Tenth Circuit addressed whether jeopardy had attached when the district court dismissed the indictment following a motion to dismiss by the defendant. *La Cock* also cited *Serfass,* finding that, since the defendant had "not yet waived his right to a jury trial" and "the district court could not have decided Defendant's innocence or guilt, . . . jeopardy had not yet attached." *Id.* at 887 n.8. Although *King, Marchese,* and *La Cock* did not involve dismissals pursuant to plea agreements, these cases,

all of which cite *Serfass,* paint *Mintz* as an aberrance in Tenth Circuit law. The court thus declines to rely on *Mintz.*

Defendant argues that *Ricketts v. Adamson,* 483 U.S. 1, 107 S. Ct. 2680, 97 L. Ed. 2d 1 (1987), enounces different double jeopardy standards specific to the plea bargaining context. However, *Ricketts* is not inconsistent with the principles of *Serfass.* In *Ricketts,* the defendant was charged with first degree murder but pled guilty to the lesser included offense of second degree murder pursuant to a plea agreement that required him to testify against two other individuals who were involved in the same murder. The defendant originally testified as required under the agreement, but when the convictions of the two individuals were overturned and the government pursued retrial, the defendant refused to testify, believing that he was not required to do so after his sentencing. The government filed a new information charging the defendant with first degree murder, and the defendant was convicted and sentenced to death. The plea agreement the defendant had signed provided that, if the defendant refused to testify, the "entire agreement [would be] null and void and the original charge would be *automatically* reinstated," and the parties would be "returned to the positions they were in before this agreement." *Ricketts,* 483 U.S. at 9. Finding that the defendant's petition for a writ of habeas corpus should have been denied, the Court held that, under the terms of the plea agreement, defendant had waived the double jeopardy

defense, and defendant's breach of the plea agreement simply returned both parties to the status quo before any plea agreement had been signed. The Court explained that "the Double Jeopardy Clause . . . does not relieve a defendant from the consequences of his voluntary choice." *Id.* at 11 (citing *United States v. Scott,* 437 U.S. 82, 98 S. Ct. 2187, 57 L. Ed. 2d 65 (1978)). The focus of *Ricketts* was thus not on the attachment of jeopardy but on a breach of plea agreement theory.

The most instructive case in the Second Circuit on the issue of whether jeopardy has attached in the instant case is *United States v. Fontanez,* 869 F.2d 180 (2d Cir. 1989). In *Fontanez,* the defendant, who was charged with three violations of Canadian law, pled guilty to cocaine possession. The other two counts against him, possession of hashish and a conspiracy count, were withdrawn. Fontanez was later indicted in the U.S. District Court for the Northern District of New York ("NDNY") for conspiracy among other crimes. Upon Fontanez's motion to dismiss the indictment, the government agreed to dismiss the conspiracy charge, and the defendant later pled guilty to a single Travel Act count. The Second Circuit denied the defendant's appeal of his conviction on double jeopardy grounds because "the only counts on which Fontanez was put in jeopardy" – the cocaine possession and Travel Act counts in the Canada and NDNY indictments, respectively – were "separate offenses" under *Blockburger v. United States,* 284 U.S. 299, 52 S. Ct. 180, 76 L. Ed. 306

(1932). The court specifically addressed attachment of jeopardy regarding the conspiracy counts, because Fontanez had argued that the conspiracy counts in the Canadian and NDNY indictments, both of which were dismissed when the defendant pled guilty to other counts, were "virtually identical": "Though the two conspiracy charges were indeed similar, this argument is unavailing, for when a count has been dismissed, jeopardy has not attached unless the defendant was first 'put to trial.'" *Fontanez,* 869 F.2d at 183 (quoting *Serfass,* 420 U.S. at 388 (quoting *Jorn,* 400 U.S. at 479)).

Also instructive is *Lockett v. Montemango,* 784 F.2d 78 (2d Cir. 1986). In *Lockett,* the Second Circuit reversed the district court's granting of Lockett's petition for a writ of habeas corpus, wherein Lockett had challenged, on double jeopardy grounds, New York State's right to prosecute him for armed robbery. After being found not fit to stand trial based on a diagnosis of post-traumatic stress disorder brought on by "Vietnam War syndrome," Lockett entered a plea of not responsible by reason of mental disease or defect pursuant to N.Y. Crim. Proc. Law § 220.15.[3] *Lockett,* 784 F.2d at 79. Upon Lockett's guilty plea, which the court accepted after holding a hearing, all criminal proceedings against Lockett were terminated, and he was remanded for possible civil commitment. *See id.*

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[3] This section allows a defendant to raise an insanity defense before trial in the form of a plea, which the state must consent to and the court must accept.

at 79-80. The State later learned that Lockett had never served in the Vietnam War, and the Supreme Court, Kings County, granted the State's motion to vacate Lockett's plea, holding that double jeopardy had not attached. On appeal, the Appellate Division held that the Supreme Court had no authority to vacate the plea but did not reach the double jeopardy issue. The New York Court of the Appeals reversed the Appellate Division and held that vacating Lockett's plea and prosecuting him did not present double jeopardy problems, since jeopardy had not attached.

The Second Circuit, in noting the Supreme Court's caution "against the use of mechanical rules in double jeopardy analysis, at least in unusual procedural settings," *Lockett,* 784 F.2d at 82 (citing *Illinois v. Somerville,* 410 U.S. 458, 467, 93 S. Ct. 1066, 35 L. Ed. 2d 425 (1973)), also explained:

> While it is evident that a trial on the merits will cause jeopardy to attach once the jury has been empanelled or the first witness has been called at a bench trial, it is less clear as to what *pretrial* proceedings are such as to place a defendant in jeopardy.

Id. In finding that jeopardy did not attach when Lockett entered his plea, the Second Circuit focused on the language in *Serfass* that, "[w]ithout risk of a determination of guilt, jeopardy does not attach, and neither an appeal nor further prosecution constitutes double jeopardy." *See id.* at 83-84. The court further reasoned: "Since jeopardy can attach only at a

proceeding where the defendant risks conviction, *Serfass, supra,* no jeopardy attached at appellee's plea proceeding." *Id.* at 84.

The Second Circuit decisions in *Fontanez* and *Lockett*[4] are consistent with decisions in other circuits holding that jeopardy does not attach when a charge is dismissed pursuant to a plea agreement. In some of the cases, it is clear that the charges were dismissed

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[4] Following oral argument, the court gave the parties an opportunity to identify other relevant Second Circuit authority on whether jeopardy attaches to a dismissal with prejudice, pursuant to a plea agreement. No other applicable cases were presented to the court. As the government notes in its second supplemental brief, the defendant's citation of *United States v. Cambindo Valencia,* 609 F.2d 603 (2d Cir. 1979), does not undermine *Fontanez* and *Lockett.*

In *Cambindo Valencia,* defendants Jesus and Rosalinda Losada challenged, on double jeopardy grounds, their convictions for a conspiracy count involving cocaine. Jesus and Rosalinda had been prosecuted previously for conspiracy to distribute cocaine; Jesus had pled guilty and, as part of his plea agreement, the conspiracy charges against Rosalinda were dismissed. The Second Circuit in *Cambindo Valencia* recognized that jeopardy had attached to Jesus because he pled guilty to the conspiracy charges but remanded the case to the district court to reapply the "same offense" test. 609 F.2d at 637-38. The Second Circuit noted that, if after further analysis, the district court were to find Jesus's conspiracy conviction barred by double jeopardy, Rosalinda's conviction also would be barred pursuant to the plea agreement signed by Jesus. *Id.* at 638. Indeed, when the district court, on remand, granted Jesus's motion to dismiss on double jeopardy grounds, the court dismissed the conspiracy count against Rosalinda "because of the government's failure to honor a plea agreement." *United States v. Losada,* 674 F.2d 167, 169 (2d Cir. 1982) (reporting district court outcome on remand).

with prejudice. *See, e.g., United States v. Garner,* 32 F.3d 1305, 1311 (8th Cir. 1994) ("Jeopardy never attached to the charges dismissed [with prejudice] as part of [the] plea agreement."). In other cases, courts have held that jeopardy has not attached, but it is unclear whether the plea agreements stated that charges were dismissed "with prejudice." *See, e.g., United States v. Nyhuis,* 8 F.3d 731, 735 n.2 (11th Cir. 1993) ("We may disregard the § 846 conspiracy charge in the Michigan indictment which was dismissed pursuant to Nyhuis's plea agreement because jeopardy did not attach to that dismissed charge."); *United States v. Soto-Alvarez,* 958 F.2d 473, 482 (1st Cir. 1992) ("The 1985 indictment charged the defendant with seven separate offenses, however we only concern ourselves with the two charges to which the defendant pled guilty since jeopardy ordinarily does not attach to counts which are dismissed and on which no finding of guilty is made."); *United States v. Vaughan,* 715 F.2d 1373, 1376-77 (9th Cir. 1983) (jeopardy did not attach to charges dismissed pursuant to plea agreement). The court in *Vaughan* cited *United States v. Dahlstrum,* 655 F.2d 971, 974 (9th Cir. 1981), *cert. denied,* 455 U.S. 928, 102 S. Ct. 1293, 71 L. Ed. 2d 472 (1982), for the proposition that "dismissal is not equivalent to acquittal even if dismissal is 'with prejudice.'" 715 F.2d at 1376.

Under the facts of the instant case, defendant was never "put to trial before the trier of facts," and there was no "risk of a determination of guilt." *See Serfass,* 420 U.S. at 391-92. In considering the Second

Circuit's reasoning in *Fontanez* and *Lockett,* as well as relevant cases from other circuits, the court finds that jeopardy did not attach when the racketeering conspiracy charge was dismissed with prejudice from the 2001 indictment pursuant to defendant's plea agreement.

Because the court finds that jeopardy did not attach, it is unnecessary to address defendant's arguments in citing *United States v. DeCologero,* 364 F.3d 12 (1st Cir. 2004), for the proposition that "the *double jeopardy clause* prohibits the government from fragmenting the same criminal conduct into different crimes (racketeering acts) in successive RICO conspiracy prosecutions where . . . there is an identity of enterprises" (Def.'s Mem. at 7). The defendant in *DeCologero* was acquitted following a jury trial and jeopardy certainly attached. *See id.* at 17; *see also United States v. Carrozza,* 55 F. Supp. 2d 84, 88 (D. Mass. 1999) (reporting DeCologero's acquittal). Therefore, the court in *DeCologero* reached the question of whether the RICO conspiracies charged in the two indictments were "the same" for double jeopardy purposes.[5]

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[5] The First Circuit separately addressed the district court's decision to divide the case into two separate trials and "postpone" three of the substantive counts and four of the predicate acts. The government cross-appealed this decision, arguing that the postponement would preclude the government from bringing RICO charges in a later trial because of the Double Jeopardy Clause. *DeCologero,* 364 F.3d at 17. The First Circuit ultimately vacated the district court's case management order because "the

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Based on the court's finding that jeopardy never attached, defendant's motion to dismiss the 2004 indictment on double jeopardy grounds is denied.

Breach of Plea Agreement

The court also considers whether, by filing the present 2004 indictment, the government has breached the plea agreement the defendant signed in January 2002, disposing of the 2001 indictment.[6] As the Court explained in *Santobello v. New York,* when a defendant accepts a guilty plea, there must be "safeguards to insure the defendant what is reasonably due in the circumstances. Those circumstances will vary, but a constant factor is that when a plea rests in any significant degree on a promise or

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district judge did not make findings, or negate alternatives, that would justify the extreme remedy of excluding otherwise properly charged RAs [predicate acts] from the initial trial." *Id.* at 25. However, the First Circuit commented that, based upon "the government's premise that all of the predicate acts charged comprised the same pattern, a second RICO prosecution based on the postponed acts would arguably itself be barred by double jeopardy principles, the 'acts' being different but the 'pattern' being the same." *Id.* at 21. Given that the First Circuit was analyzing the district court's plan to have two separate trials, this comment assumes that jeopardy would have attached after a first trial. In the instant case, the court concludes that jeopardy never attached. Thus, again, for double jeopardy purposes, the court need not compare the two conspiracies alleged in the 2001 and 2004 indictments.

[6] Though defendant did not initially present this argument in his motion to dismiss, both the government and defendant addressed it in subsequent papers and at oral argument.

agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled." 404 U.S. 257, 262, 92 S. Ct. 495, 30 L. Ed. 2d 427 (1971). Plea agreements are to be interpreted using principles of contract law. *See, e.g., In re Altro,* 180 F.3d 372, 375 (2d Cir. 1999); *United States v. Pollack,* 91 F.3d 331, 334 (2d Cir. 1996). "In deciding whether a plea agreement has been breached, a court must look to what the parties to the plea agreement reasonably understood to be its terms." *United States v. Lovaglia,* 954 F.2d 811, 817 (2d Cir. 1992). The terms of the agreement must be construed strictly. *Pollack,* 91 F.3d at 335. In addition, any ambiguities must be resolved against the government, in recognition of the government's bargaining advantage. *In re Altro,* 180 F.3d at 375.

Pursuant to the plea agreement defendant signed in 2002, defendant shall not face further charges for the "specific crimes" charged in the 2001 indictment. However, the plea agreement "does not bar the use of such conduct as a predicate act or as the basis for a sentencing enhancement in a subsequent prosecution including . . . 18 U.S.C. §§ 1961 *et seq.*" The plain meaning of these provisions, read together, is that the plea agreement only bars a subsequent racketeering conspiracy charge composed of exactly the same predicate acts. The agreement specifically allows conduct alleged in the 2004 indictment to be used as a predicate act, as long as the "specific crime" is not realleged. The agreement does not bar, as defendant argues, all further racketeering conspiracy charges,

because further racketeering prosecution is explicitly permitted under the agreement. Ignoring the "subsequent prosecution" language would go against the principle that a contract interpretation that "gives a reasonable, lawful, and effective meaning to all the terms is preferred to an interpretation [that] leaves a part unreasonable, unlawful, or of no effect." RESTATEMENT (SECOND) OF CONTRACTS § 203 (1981); *see also LaSalle Bank Nat'l Ass'n v. Nomura Asset Capital Corp.*, 424 F.3d 195 (2d Cir. 2005) ("words and phrases should be given their plain meaning and the contract should be construed so as to give full meaning and effect to all of its provisions" (internal quotation marks and alterations omitted)).

Defendant has only argued that Racketeering Acts Three and Four in the 2004 indictment overlap with the 2001 indictment (specifically, Racketeering Act Three). The government maintains that none of the predicate acts charged in the 2001 indictment is realleged in the present indictment but "does not dispute that the factual circumstances from which the charge in Racketeering Act 3 arose are the same circumstances giving rise to the marijuana distribution predicate act in the prior indictment."[7] (Gov't

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[7] In its initial memorandum in opposition to defendant's motion to dismiss, the government stated that the armed robbery of marijuana as alleged in Racketeering Act Four "was not even known to the government until 2004," (Gov't Mem. at 10), and that "the present prosecution was made possible, in large part, because of the recent cooperation of a Colombo family soldier in 2003 and a Colombo family associate in 2004, both of

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Supplemental Mem. at 15 n.6.) In comparing the descriptions of Racketeering Acts Three in both the 2001 and 2004 indictments – as well as the PSR and Special Agent Pontecorvo's supplemental affidavit – the government's position that the conduct described relates to the "two distinct crimes" of conspiracy to distribute marijuana and robbery is at least somewhat suspect. Indeed, though the 2001 indictment alleges conspiracy to distribute marijuana, the PSR states that "it is unknown whether Dionisio and Monteperto distributed" the marijuana, (Def.'s Ex. A ¶21). The government's recently submitted supplemental affidavit, however, states that "Dionisio further advised Cutolo, Jr. that he had sold the load of marijuana." (Pontecorvo Aff. ¶4.) Without the supplemental affidavit, Racketeering Acts Three in the 2001 and 2004 indictments arguably both involved marijuana robbery, despite the "Conspiracy to Distribute Marijuana" label in the 2001 indictment.

The defendant attacks Racketeering Act Four in the 2004 indictment because it also involves marijuana robbery; however, this marijuana robbery allegedly took place in lower Manhattan, whereas the robbery alleged in Racketeering Act Three in the 2001

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whom were co-conspirators of Dionisio in the four predicate acts (two each)," (*Id.* at 5). However, the government also did "not dispute that the marijuana trafficking charged in the 2001 indictment came about because of the armed robbery charged in the present indictment as Racketeering Act Three." (*Id.* at 10-11.)

indictment allegedly took place in Baltimore, as indicated in the PSR and admitted by defendant. (Def.'s Mem. at 10; Def.'s Ex. C ¶40.)

Therefore, at most, only one predicate act in the 2004 indictment overlaps with the 2001 indictment. Even assuming Racketeering Acts Three in both indictments to be the same or similar conduct, the 2004 indictment is not barred. The plea agreement defendant signed in 2002 allows subsequent racketeering conspiracy charges using at least some of the same conduct alleged in the 2001 indictment as predicate acts.

Defendant urges the court to interpret the phrase "specific crimes" more broadly and suggests that the court use the five factor test adopted by the Second Circuit in *Russotti v. United States,* 717 F.2d 27 (2d Cir. 1983), to decide whether the racketeering conspiracies alleged in the 2001 and 2004 indictments are the same "specific crimes," as prohibited in the plea agreement. In *Russotti,* the Second Circuit held that, in analyzing whether two racketeering conspiracy charges are the "same offense" for double jeopardy purposes,[8] "*both* the enterprise and the pattern of activity alleged . . . must be the same. . . . If either is different, there is no infirmity under the double

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[8] The court in *Russotti* also explained the inquiry as establishing the "allowable unit of prosecution" in light of a prior conviction or acquittal. 717 F.2d at 32 (quoting *Sanabria v. United States,* 437 U.S. 54, 98 S. Ct. 2170, 57 L. Ed. 2d 43 (1978)).

jeopardy clause." 717 F.2d at 33. *Russotti* imported a test used by the Eighth Circuit in *United States v. Dean,* 647 F.2d 779 (8th Cir. 1981), to determine whether two racketeering conspiracy charges allege distinct patterns of racketeering activity.[9] 717 F.2d at 32.

If the plea agreement defendant signed had mirrored language from the Double Jeopardy Clause, for example, by prohibiting "prosecutions for the same criminal offense," the import of the *Russotti/ Dean* test might be appropriate. However, the plea agreement uses the phrase "specific crimes" and explicitly allows subsequent racketeering prosecutions using the "conduct [alleged in the 2001 indictment] as a predicate act." These were the contractual terms negotiated between the defendant and the government, and they should not be disturbed. Breach of plea agreement and double jeopardy defenses are separate, and, in particular where jeopardy has not attached, the former may prove more successful. *See, e.g., Vaughan,* 715 F.2d at 1377 n.1. The

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[9] As listed in *Dean,* the five factors are:

> (1) the time of the various activities charged as parts of separate patterns; (2) the identity of the persons involved in the activities under each charge; (3) the statutory offenses charged as racketeering activities in each charge; (4) the nature and scope of the activity the government seeks to punish under each charge; and (5) the places where the corrupt activity took place under each charge.

647 F.2d at 788.

breach of plea agreement defense depends not on double jeopardy standards but on the language used in the plea agreement, subject to strict contract interpretation. In the present case, by the terms of the plea agreement, the court finds the 2004 indictment permissible.

Conclusion

For the reasons stated above, defendant's motion to dismiss the 2004 indictment is denied.

SO ORDERED.

DATED: Brooklyn, New York

February 15, 2006

/s/

DORA L. IRIZARRY

United States District Judge

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
THURGOOD MARSHALL U.S. COURT HOUSE
40 FOLEY SQUARE, NEW YORK, N.Y. 10007

Catherine O'Hagan Wolfe
CLERK OF COURT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, in the City of New York, on the 24th day of March, Two Thousand and Eight,

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United States of America,

Appellee,

v.

Dominick Dionisio,
A.K.A. Black Dom,

Defendant-Appellant.

ORDER
No. 06-0908-cr

(Filed Mar. 24, 2008)

Defendant-Appellant Dionisio having filed a petition for panel rehearing, or, in the alternative, for rehearing *en banc*, and the panel that determined the appeal having considered the request for panel rehearing, and the active members of the Court having considered the request for rehearing *en banc*,

IT IS HEREBY ORDERED that the petition is denied.

For the Court:
Catherine O'Hagan Wolfe, Clerk

By: /s/ Frank Perez
Frank Perez, Deputy Clerk